

These are the tentative rulings for civil law and motion matters set for Tuesday, November 12, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Friday, November 8, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

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EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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**1. M-CV-0059699 Randolph, Patricia vs. CA Department of Motor Vehicles**

Appearance required on November 12, 2013 at 8:30 a.m. in Department 40.

**2. S-CV-0025503 Espinoza, Alejandro "Alex" v. Squaw Creek Transp. Inc, et al**

The Motion to Strike was dropped by the moving party.

**3. S-CV-0029327 Allard, Linda vs. Ham, Jayne Yeh, et al**

Plaintiff's Petition to Reduce Medi-Cal Lien is granted. Welfare and Institutions Code section 14124.76 provides that a beneficiary may bring a motion for court determination as to the portion of a settlement representing payment for medical expenses in order to determine the amount available to satisfy a Medi-Cal lien. The court is to be guided by the United States Supreme Court decision in *Arkansas Dept. of Health & Human Svcs. v. Ahlborn* (2006) 547 U.S. 268 in determining what portion of a settlement represents payment for medical expenses or medical care. The total settlement amount in light of plaintiff's damages provides a factual basis upon which to make an allocation as to medical damages. *Lima v. Vouis* (2009) 174 Cal.App.4th 242, 257-258; *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 755-756.

Plaintiff asserts that the total value of her action is \$1 million. Neither defendants nor the California Department of Health Care Services ("DHCS") have objected to plaintiff's estimation of the value of her action, or opposed the petition in any way. Plaintiff reached a settlement agreement with defendants in this action for \$35,000, which represents 3.5% of the total estimated value of the case. Under the reasoning of *Arkansas Dept. of Health & Human Svcs. v. Ahlborn*, DHCS's Medi-Cal lien shall be reduced by the same ratio of the settlement amount to the total value of plaintiff's damages. Accordingly, DHCS's Medi-Cal lien shall be reduced to \$956.62.

**4. S-CV-0031425 Nesva, Roya vs. JPMorgan Chase Bank, N.A., et al**

Defendants' request for judicial notice is granted. Defendants' Motion for Summary Judgment is denied.

A motion for summary judgment shall be granted if "all the papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Code Civ. Proc. §437c(c). The complaint in this action alleges two causes of action: (1) violation of Civil Code section 2923.5; and (2) violation of Business and Professions Code sections 17200, *et seq.* Both causes of action are based on the purported failure of defendants to contact plaintiff at least 30 days prior to the recording of a notice of default, to explore options to avoid foreclosure.

Defendants' submitted evidence establishes that plaintiff first defaulted on her loan in or about March 2010, was offered a trial period plan in or about July 2011, and qualified for and accepted a permanent loan modification agreement on September 6, 2011. (Def't. SSUF 5, 12, 13). Plaintiff subsequently defaulted on the modified loan agreement on or about February 1, 2012. (*Id.*, 15). Between March 5, 2012 and April 13, 2012, defendant JPMorgan Chase Bank, N.A. ("JPMorgan") sent at least four letters to plaintiff advising her that her loan payments were past due, and describing potential available workout options. (*Id.*, 17-20). Between April 24, 2012 and May 24, 2012, JPMorgan attempted to contact plaintiff by phone over 20 times. (*Id.*, 21). On April 30, 2012, JPMorgan spoke with plaintiff by telephone to review the terms of the workout, and advised plaintiff that she was eligible for liquidation review. Plaintiff stated that she would explore other options. (*Id.*, 22). On May 24, 2012, a notice of default was recorded with respect to the subject property. The declaration of compliance attached to the notice of default states that 30 days had elapsed since plaintiff was contacted in compliance with Civil Code section 2923.5. (*Id.*, 23).

Civil Code section 2923.5 provides that "[a] mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until 30 days after initial contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (e)." Civil Code section 2923.5(a)(2) states that contact shall be made in person or by telephone to assess the borrower's financial situation and explore options to avoid foreclosure. Under Civil Code section 2923.5(e), due diligence may be established in the absence of actual contact in person or by telephone. Subsection (e) requires the mortgage servicer to first send the borrower a first-class letter, then attempt to contact the borrower by telephone at least 3 times at different hours on different days.

The evidence submitted by defendants does not establish that JPMorgan made contact with plaintiff in person or by telephone at least 30 days prior to the recordation of the notice of default. For purposes of compliance with the statute, contacts made with plaintiff prior to the acceptance of a new permanent loan modification agreement are not relevant. Contact was made with plaintiff on April 30, less than 30 days before the notice of default was recorded. Further, defendants fail to establish that at least 30 days elapsed after satisfaction of the due diligence requirements described in Civil Code section 2923.5(e), before the recordation of the notice of default. Although several letters were sent to plaintiff, the first attempted phone call did not take

place until April 24, with the second and third calls occurring on April 25 and April 27, respectively. Defendants offer no evidence regarding the hours the calls were made.

The only remedy available for a violation of Civil Code section 2923.5 is postponement of the sale pending compliance with the statute. *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 235. Defendants argue that because the sale has not yet taken place, and because defendants did make contact with plaintiff by April 30, plaintiff has already received the only remedy to which she is entitled. However, if plaintiff can prove a lack of compliance with the statute, the notice of default is not valid, without which the foreclosure sale cannot proceed. *Id.* at 223. Therefore, defendants would not be entitled to summary judgment on the grounds that the foreclosure sale has not yet occurred.

As defendants fail to satisfy their initial burden of production to make a prima facie showing that there are no triable issues of material fact with respect to plaintiff's claims, the burden does not shift to plaintiff to show the existence of a triable issue of material fact. See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.

Although not set forth in the points and authorities, the court also notes that defendants' notice of motion states that summary adjudication is appropriate as to US Bank because US Bank had no interest in the subject loan for at least 30 days prior to the recordation of the notice of default, and therefore had no obligation to comply with Civil Code section 2923.5 with respect to plaintiff's loan. The motion is denied on this ground as well. Based on documents of which the court takes judicial notice, an assignment of deed of trust was recorded on July 19, 2010, by which US Bank was named beneficiary under the subject deed of trust. On July 28, 2010, a substitution of trustee named Quality Loan Service Corp. as trustee under the deed of trust. The notice of default recorded on May 24, 2012 instructs the borrower to contact US bank to arrange for payment to stop the foreclosure. Defendants fail to establish that US Bank had no interest in the subject loan, and therefore the burden does not shift to plaintiff to show the existence of a triable issue of material fact with respect to US Bank's interest in the loan.

**5. S-CV-0032437 Tiskiy, Nadezhda, et al vs. Teuscher, Wade, et al**

The Demurrer to Complaint is dropped. A first amended complaint has been filed.

**6. S-CV-0032549 Hofsaess-Fischer, Sharon vs. Westview Healthcare Center**

The Motion to Compel is dropped. The action has been stayed pending arbitration.

**7. S-CV-0032765 Votaw, Ashley vs. Tarr, Rachel Leigh, et al**

Plaintiff's Motion to Consolidate Superior Court Case With Uninsured Motorist Claim is granted. The uninsured motorist matter of claimant Ashley Votaw against respondent Allstate Indemnity Company shall be consolidated with Placer County Superior Court Case No. SCV-0032765, Ashley Votaw v. Rachel Leigh Tarr, et al.

**8. S-CV-0032797 Sadek, Kevin J. vs. Union Pacific Railroad Company**

Plaintiff Kevin Sadek's Motion to Compel Further Responses and Documents is granted in part, and denied in part.

Plaintiff's motion to compel is granted as to Special Interrogatories, Set One, Nos. 10 and 11. Each answer in response to an interrogatory must be "as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possible." Code Civ. Proc. § 2030.220(a),(b). "If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party." Code Civ. Proc. § 2030.220(c); *Regency Health Services, Inc. v. Superior Court* (1998) 64 Cal.App.4th 1496, 1504. Neither the responses nor defendant's opposition establish that defendant has made a reasonable and good faith effort to obtain the requested information by inquiry to other natural persons or organizations. Accordingly, the responses do not comply with the Code of Civil Procedure, and further responses are warranted.

Plaintiff's motion to compel is denied as to Special Interrogatories, Set One, Nos. 12 and 13. Defendant maintains that it has responded to these interrogatories to the extent possible. It is conceivable that, not having met with expert witnesses or obtained sufficient discovery, defendant has not formulated a concrete alternative theory regarding the subject incident. Defendant provides facts it believes supports the contention that plaintiff's version of events is inaccurate. The court does not find the responses to be insufficient at this juncture in the lawsuit.

Plaintiff's motion to compel is granted as to Requests for Production of Documents, Set One, Nos. 8-11 and 13-14. Defendant's responses to these requests do not comply with the Code of Civil Procedure. The party to whom a demand for documents is directed must respond with either an agreement to comply, a representation of the inability to comply, or an objection to all or part of the demand. Code Civ. Proc. § 2031.210(a). If the responding party agrees to comply, the response must state that the production will be allowed in whole or in part, and that the documents in the responding party's possession, custody or control will be produced. Code Civ. Proc. § 2031.220. Defendant's responses contain no such statement. The assertions set forth in the opposition are insufficient for this purpose.

The court will not order defendant to produce documents which it states, under oath, that it does not possess, and the court makes no determination regarding whether defendant has improperly withheld documents in its custody, possession or control that are responsive to plaintiff's requests. However, if plaintiff is later able to establish that defendant engaged in a misuse of the discovery process by withholding responsive documents, he may seek appropriate sanctions at that time.

Further responses to the subject discovery requests referenced in this ruling shall be served by no later than December 3, 2013.

**9. S-CV-0032871 Degrinis, James vs. Ford Motor Company**

Defendant's Motion for Relief From Waiver of Objections

Defendant Ford Motor Company's ("Ford's") Motion for Relief From Waiver of Objections to Plaintiffs' First Set of Written Discovery is granted.

The court has authority to relieve a party from its waiver of objections where the party's failure to serve timely responses resulted from mistake, inadvertence or excusable neglect, and the party has belatedly served responses in substantial compliance with the party's duty to respond. Code Civ. Proc. §§ 2030.290(a), 2031.300(a), 2033.280(a). Ford adequately establishes that its failure to timely serve responses was the result of mistake, inadvertence or excusable neglect, based on the declaration of Deanna J. Louviere-Hernandez. Plaintiff James Degrinis ("Degrinis") argues that the responses are not in substantial compliance with the Code of Civil Procedure. Degrinis asserts that Ford has responded with boilerplate objections to at least two requests for admission and one special interrogatory, rather than providing full and complete responses. Degrinis also complains that defendant has failed to produce certain relevant documents, and failed to comply with certain provisions of the Code of Civil Procedure in responding to document requests, without identifying particular documents or requests. Degrinis' sparse showing and conclusory statements do not warrant the conclusion that each of Ford's objections to the discovery requests lacks basis, and is merely "boilerplate", or that Ford's responses do not substantially comply with the Code of Civil Procedure.

Plaintiff's Motion to Compel

In light of the ruling on Ford's Motion for Relief From Waiver, Degrinis' Motion to Compel Further Discovery Responses is denied. This ruling is without prejudice to plaintiff moving to compel further responses based on the inadequacy of any particular responses, or propriety of specific objections to the requests. Any such motion must be filed and served within 45 days of the hearing date of this motion, unless extended by stipulation of the parties.

**10. S-CV-0033121 Smith, Willie, et al vs. Bank of America, et al**

The Demurrer to the Complaint is dropped as moot. The complaint is not the current operative pleading, as a first amended complaint was filed on October 8, 2013.

**11. S-CV-0033519 Napoles, Santiago vs. One West Bank FSB**

Appearance required on November 12, 2013 at 8:30 a.m. in Department 40.

**12. S-CV-0033601 Hernandez, Allen, et al vs. Directv, Inc., et al**

Defendants' Motion to Strike Portions of Plaintiffs' Complaint is granted with leave to amend. Plaintiffs fail to allege facts which rise to the level of malice, fraud or oppression required to support an award of exemplary damages. *See Turman v. Turning Point of Central Cal., Inc.* (2010) 191 Cal.App.4th 53, 63. Plaintiffs allege that the area in which the incident

occurred was clearly marked as a construction repair zone, which required drivers to slow down, but that defendant Mang Thao (“Thao”) did not slow down, admitting to driving 65 miles per hour. Further, when the vehicle in front of Thao braked suddenly, forcing Thao to brake and swerve to the right, Thao chose to turn back to the left to avoid colliding with the right shoulder embankment, which evidenced an indifference and conscious reckless disregard for the health and safety of other motorists.

The allegations supporting plaintiffs’ prayer for exemplary damages do not demonstrate “conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct, which is carried out by the defendant with a willful and conscious disregard of the rights or safety of others.” Civ. Code § 3294(c)(1). At most, the allegations support a finding of negligence by Thao, which would not constitute malice pursuant to Civil Code section 3294.

Plaintiffs shall file and serve any amended complaint by no later than December 3, 2013.

**13. S-CV-0033713 Cleveringa, Jennifer, et al vs. USAA**

The Petition to Compromise Minor’s Claim is granted. If oral argument is requested, appearance of the minor is excused at the hearing.

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